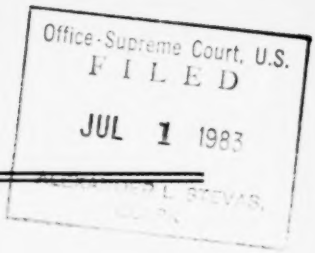
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No.



In the Supreme Court of the United States

October Term, 1982

RITA ARMILIO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE EIGHTH CIRCUIT COURT OF APPEALS ERRONEOUSLY CONCLUDE IN THIS CASE THAT "MATERIALITY" (WHICH IS AN ESSENTIAL ELEMENT OF THE OFFENSE WITH WHICH PETITIONER WAS CHARGED) DOES NOT HAVE TO BE PROVEN BEYOND A REASONABLE DOUBT?

II. DID THE EIGHTH CIRCUIT ERRONEOUSLY FAIL TO PRESERVE PETITIONER'S RIGHT TO A JURY TRIAL, WHICH RIGHT IS CONSTITUTIONALLY GUARANTEED TO EVERY AMERICAN ACCUSED OF A FELONY CRIME?

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

Rita Armilio, Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth Circuit Court of Appeals which was entered in the above-entitled case on the 9th day of May, 1983.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at ..... F.2d ..... (8th Cir. 1983). A copy of said opinion is contained in the Appendix, *infra*, beginning at page A2.

A copy of the Judgment and Commitment Order entered by the United States District Court for the Western District of Missouri, Western Division, the Honorable Elmo B. Hunter presiding, is contained in the Appendix, *infra*, at page A1.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals (Appendix, *infra*, pages A2-A8) was entered on May 9, 1983. This Petition has been timely placed in the mails, as provided for in Supreme Court Rules 20 and 28.2, within 60 days from the judgment date and is, thus, timely filed in accordance with the rules of this Honorable Court.

Jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1), and Rule 17 of the Revised Rules of the Supreme Court of the United States.

STATUTES INVOLVED

Petitioner was charged with committing perjury before a grand jury in violation of 18 U.S.C. Section 1623. Section 1623 provides:

> (a) "Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code [28 USCS § 1745]) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> (b) This section is applicable whether the conduct occurred within or without the United States.

(c) Any indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be expected.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number

of witnesses or by documentary or other type of evidence."

The grand jury before which petitioner appeared was investigating whether a certain Carl Civella had violated 18 U.S.C. Section 922(h) and 18 U.S.C. App. Section 1202(a), which sections prohibit possession of a firearm by a felon.

Section 922(h) provides:

"It shall be unlawful for any person -

(1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to marihuana or any depressant or stimulant drug (as defined in section 201(v) of the Federal Food Drug and Cosmetic Act) or narcotic drug (as defined in section 4731(a) of the Internal Revenue Code of 1954); or

(4) who has been adjudicated as a mental defective or who has been committed to any mental institution;

to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Section 1202(a) provides:

"Any person who . . . has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, . . . and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

STATEMENT OF THE CASE

Petitioner was summoned before a Federal grand jury on or about August 26, 1981 and was asked questions regarding her purchase on April 4, 1980 of a .38 caliber revolver at a gun store (hereinafter sometimes referred to as "C&R"). See page 8 of the Transcript of Trial Proceedings (hereinafter cited as "TR 8"). Trial testimony revealed that petitioner had been accompanied by a white male at the time of her purchase of this revolver. TR 12. This companion had driven petitioner to C&R in a beige Lincoln automobile owned by a certain Carl Civella. TR 25-26.

Petitioner and her companion were traveling Westbound on Admiral Boulevard in Kansas City, Missouri in the beige vehicle when they passed an unmarked police car which, at the time, was Eastbound on Admiral Boulevard. TR 25. Both automobiles were being operated at approximately 25 to 30 miles per hour, thus meeting at a speed in excess of 50 miles per hour. TR 34. A Kansas City, Missouri, police officer, Harold Nichols, who was accompanied by police officer Randy Collins, occupied the unmarked police vehicle. TR 25, 33. Officers Collins and Nichols placed petitioner and her male companion under surveillance because they recognized the Lincoln as an automobile which was owned by Carl Civella, who was then of interest to these officers. TR 32. The chance meeting occurred only a short time prior to the purchase of the revolver at C&R. TR 26-27, TR 52-53.

After turning their unmarked police car around, Officers Nichols and Collins followed the beige Lincoln for approximately twenty blocks, maintaining a substantial distance from the Lincoln in order not to arouse suspicion of their surveillance. TR 33, 35. When petitioner and her

companion stopped at C&R, the officers also stopped and parked in a parking lot at the South side of C&R's business building. TR 35. Officer Collins exited the unmarked police car at that time and followed petitioner and her companion into C&R. TR 27, 49. According to Officer Collins, he approached "as close as two feet" to petitioner and her companion and observed the purchase of the revolver and the completion of various documents required for that purchase. TR 28.

When petitioner appeared before the grand jury on August 26, 1981, she identified her male companion as a certain Paul Varsalona. TR 9, 112-113. Mr. Varsalona was also called before the grand jury and he confirmed that he was petitioner's companion at the time of the purchase of the revolver. Reports filed by Officers Nichols and Collins alleged, however, that the person who accompanied petitioner was Carl Civella, a convicted felon. TR 39, 42. Officers Nichols and Collins also testified at petitioner's trial that the man who was with petitioner at the time of the revolver purchase was Carl Civella, not Paul Varsalona. TR 31, 48, 52.

Mr. Civella and Mr. Varsalona are similar in appearance. Defendant's Exhibit 1, TR 82, and Government Exhibits 3, 4 and 5. Both men wear glasses. TR 93, 107. Both men are of nearly the same age and body build. Defendant's Exhibit 1.

Despite the uncertainty in ascertaining the actual identity of the person who accompanied petitioner which was created by the similarity of appearances and by the limited time for observation of the person who was driving the beige Lincoln automobile (because of the high-speed encounter of the vehicles), petitioner was charged with committing perjury before the grand jury since her statements conflicted with those of the police officers. TR 8, 11.

Police officers Nichols and Collins were the sole Government witnesses at petitioner's trial. They both testified that the person who accompanied petitioner on April 4, 1980 when she purchased the revolver was Mr. Civella. TR 31, 48, 52.

Petitioner took the stand in her own defense and testified that she had been accompanied by Mr. Varsalona, not Mr. Civella. TR 112-113. She further testified that Mr. Varsalona had driven her to C&R and had been using Mr. Civella's car on the day in question. Witnesses David Worth, Nick Defeo and Michael G. Scott testified on behalf of the petitioner and corroborated the fact that Mr. Varsalona had been using Mr. Civella's beige Lincoln automobile on April 4, 1980, the day when the .38 caliber revolver was purchased at C&R. TR 65-66, 72-73, 77.

The prosecution acknowledged that the .38 caliber revolver was properly registered and had been purchased lawfully and that petitioner had continuously maintained physical possession and custody of the revolver after its purchase. TR 115. Further, although fingerprints were taken from the revolver after it was surrendered to the Government by petitioner in 1981, none of the fingerprints contained on the revolver were those of Carl Civella. TR 143.

Petitioner testified as to the reasons for her purchase of the revolver. TR 109.

The prosecution introduced into evidence a stipulation between the prosecution attorneys and petitioner's attorney which stated:

> "That on or about August 26, 1981, there was pending before a Special Grand Jury of the United States in the Western District of Missouri a proceeding, that is, an investigation of possible violations of Title 18, United States Code, Sections 922(h) and 1202(a)

of the Appendix involving possession of a firearm by a felon, Carl Civella.

> "That the defendant, Rita Armilio, appeared before the Special Grand Jury on August 26, 1981, and while under oath testified in response to questions as set forth in the indictment. End of Stipulation." TR 59.

The prosecution also placed in evidence (as Exhibit 2) "the grand jury testimony of the defendant, Rita Armilio, taken on the 26th of August, 1981, before the Grand Jury." TR 60.

The prosecution did not introduce evidence, other than petitioner's grand jury testimony, which reflected the totality of testimony which had been presented to the grand jury relative to the investigation of Mr. Civella. The prosecution failed to present the testimony of any member of the grand jury or the testimony of any other witness as to the materiality and/or relevance of the questions which were asked of petitioner and of the answers given by her.

After both the prosecution and petitioner had rested, the District Court "reopened" the case and ruled that if petitioner's testimony was found to be false by the jury, then such testimony "was material and relevant" as a matter of law. TR 140-142.

The District Court, instructing the jury that "materiality" was not a matter of concern to them and that petitioner's statements were in fact material to the grand jury investigation which had been ongoing when petitioner appeared before the grand jury, stated as follows:

> "I further instruct you that the materiality of the matter involved in the alleged false testimony is not

a matter with which you are concerned, but rather is a question for this Court to decide. That is, for me.

"If you find beyond a reasonable doubt that the defendant, Rita Armilio, did testify falsely as to those matters alleged in the indictment, then I instruct you as a matter of law that such testimony was material and relevant to the investigation then being conducted by the Grand Jury." TR 189-190.

Although the District Court had earlier instructed the jury that the jurors were "the sole judges of the facts of the case", TR 5, and that the District Court had "nothing to do with the finding of facts, as such", TR 6, the District Court nonetheless withdrew the materiality issue from the jury and thus refused to permit the jury to act as the fact finders relative to the materiality issue. TR 140.

At the time of making the "determination" that petitioner's testimony was "material and relevant", TR 142, the trial Judge had not yet seen all the evidence ("I have not seen all the pictures yet"). TR 140. Nor was the District Court itself ever enlightened by a transcript of the whole grand jury proceedings.

A guilty verdict was returned by the jury on September 28, 1982. Petitioner duly appealed the resulting judgment of conviction to the Eighth Circuit Court of Appeals. That Court affirmed the judgment of conviction on May 9, 1983; and petitioner now asks this Honorable Court to review the judgment of the Court of Appeals for the following reasons:

REASONS FOR GRANTING A WRIT OF CERTIORARI

In its opinion affirming the District Court's judgment, the Eighth Circuit Court of Appeals failed to follow the mandate laid down by this Court in *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), that *every* essential element of a criminal offense must be proved by proof beyond a reasonable doubt. The Eighth Circuit's opinion is also in conflict with applicable decisions of other Federal Courts of Appeal relative to the standard of proof which is required for proof of materiality.

It is respectfully submitted that certiorari should be granted by this Court to correct the error thus committed and to clarify the judicial uncertainty which has been created by the Eighth Circuit's opinion.

I. The Eighth Circuit Court of Appeals Has Erroneously Concluded in This Case That "Materiality" (Which Is an Essential Element of the Offense With Which Petitioner Was Charged) Does Not Have to Be Proven Beyond a Reasonable Doubt.

Supreme Court Rule 17.1(c) provides that one of the grounds for granting review on a writ of certiorari is:

> "When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decision of this Court."

The opinion of the Eighth Circuit Court of Appeals in this case is contra to the teachings of this Court in *In re Winship, supra; Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1886,

44 L.Ed.2d 508 (1975); and *Christoffel v. United States*, 338 U.S. 84 (1949). This Court established in those cases that every essential element of a criminal offense must be established by proof "beyond a reasonable doubt". *In re Winship*, at 90 S.Ct. 1071.

Clearly, materiality is one of the essential elements of the offense defined by 18 U.S.C. Section 1623 (the statutory section which petitioner is charged with violating). The cases which have considered this section have uniformly stated that materiality is in fact an essential element. For example, as is stated in *United States v. Bell*, 623 F.2d 1132, 1134 (5th Cir. 1980):

> "The law in this area is well-developed. Materiality is an essential element of the crime of making a false statement to a grand jury."

The Court of Appeals nonetheless expressly stated that "the standards of proof for making finding of fact are . . . simply irrelevant to the determination of materiality." Appendix, *infra*, at page A5. The Court of Appeals thus summarily rejected petitioner's argument on appeal (1) that the District Court had failed to specify the standard of proof which was being used to make the determination as to "materiality" and also (2) that there had been no proof beyond a reasonable doubt of the materiality of petitioner's statement that she had been accompanied by Mr. Varsalona (rather than Mr. Civella) when she purchased the revolver at C&R.

The Eighth Circuit Court of Appeals answered petitioner's first argument by quoting the Seventh Circuit's statement in *United States v. Watson*, 623 F.2d 1198, 1202 (7th Cir. 1980), that standard of proof considerations are not important in making a determination as to materiality. As was stated by the Seventh Circuit and quoted by the

Eighth Circuit, materiality either "is" or "is not". Under that interpretation, the prosecution does not have to meet any specific standard of proof relative to materiality:

> "A question of law is by definition susceptible of only two answers: 'yes,' the requirements of legal principle are met or 'no,' they are not met. There is, in theory at least, no continuum of assurance and dubiosity as to the establishment of a proposition of law similar to the varying degrees of certainty and uncertainty which may be ascribed to propositions of fact."

Page 4 of Slip Opinion, *infra*, at Appendix, page A5, quoting *United States v. Watson*, 623 F.2d 1198, 1202.

This position is in direct conflict with those other Circuit Courts of Appeal which have stated that materiality is to be established by a "preponderance of the evidence". See, for example, *United States v. Giacalone*, 587 F.2d 5, 7 (6th Cir. 1978). See also, *United States v. Byrnes*, 644 F.2d 107, 111 (2nd Cir. 1981), and *United States v. Berardi*, 629 F.2d 723 (2nd Cir. 1980).

The opinion of the Eighth Circuit Court of Appeals in this case also appears to be in conflict with its own *prior* decisions. See, for example, *United States v. Koonce*, 485 F.2d 374, 381 (8th Cir. 1973), and *Brown v. United States*, 245 F.2d 549, 556 (8th Cir. 1957). In both those cases the Eighth Circuit Court of Appeals expressly stated that "clear, convincing and direct evidence" was required to show the materiality of the allegedly false testimony.

The Eighth Circuit's decision in *Brethauser v. United States*, 333 F.2d 302, 306 (8th Cir. 1964), suggests that yet another standard, a "beyond a reasonable doubt" standard, should be the applicable test. The Eighth Circuit, in evaluating the District Court's findings of materiality in

Brethauser, applied a "clearly erroneous" standard of review, thereby implying that the finding of materiality was a *factual* determination entitled to a presumption of correctness (unlike a legal determination). To the same effect is the Third Circuit Court of Appeals affirmance, at 583 F.2d 122 (3rd Cir. 1978), of *United States v. Stassi,* 433 F. Supp. 661 (D.C.N.J. 1977). The Third Circuit adopted, as did the Eighth Circuit in *Brethauser,* a "clearly erroneous" standard of review. 583 F.2d 126. The decisions in both these cases thus point to a conclusion that a "beyond a reasonable doubt" standard is required. These cases indicate that issues as to materiality in a perjury case require factual determinations and this Honorable Court unmistakably mandated in *In re Winship, supra,* that:

> "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged." 397 U.S. 364. Emphasis added.

Also suggestive of the applicability of a "beyond a reasonable doubt" standard is the holding in *United States v. Valdez,* 594 F.2d 725, 729 (9th Cir. 1979); the Ninth Circuit Court of Appeals stated in *Valdez* that materiality was, "as with all of the other essential elements of the offense charged", a question for the jury and was thus, *a fortiorari,* an issue to be proved beyond a reasonable doubt. To the same effect is the express holding in *United States v. Stassi, supra,* at 443 F. Supp. 666, that "materiality", like other substantive elements of a criminal offense, must be proved "beyond a reasonable doubt."

The foregoing cited decisions obviously manifest conflicting positions. The Eighth Circuit in the instant case and the Seventh Circuit in *United States v. Watson, supra,*

espouse a simple "yes" or "no" test in which neither the "preponderance of the evidence" test nor the "proof beyond a reasonable doubt" test applies. The Second Circuit in *United States v. Byrnes, supra,* and *United States v. Berardi, supra,* has held that a "preponderance of the evidence" test applies for deciding materiality. The Eighth Circuit in its prior decisions in *United States v. Koonce, supra,* and *Brown v. United States, supra,* stated that "clear, convincing and direct evidence" was required. The Ninth Circuit in *United States v. Valdez,* 594 F.2d 725, 729 (9th Cir. 1979), and perhaps the Third Circuit, in *United States v. Stassi,* 583 F.2d 122 (3rd Cir. 1978), by affirming *United States v. Stassi,* 443 F. Supp. 661 (D.C.N.J. 1977), held that materiality is an issue for the jury, not the court and, *a fortiorari,* that proof "beyond a reasonable doubt" is required.

As is stated in Supreme Court Revised Rule 17.1(a) of this Honorable Court's Rules, favorable consideration should be given to the issuance of a writ of certiorari "when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter". Such conflict obviously exists in the present case and petitioner therefore respectfully submits that a writ of certiorari should issue. This is particularly true since the Eighth Circuit's opinion in this case conflicts not only with decisions in other Circuit Courts of Appeal relative to what standard of proof is required but also because that opinion conflicts with the principles laid down by this Court in *In re Winship, supra.*

Certiorari should also be granted because the Eighth Circuit endorsed and approved the District Court's withdrawal of the "materiality" issue from the jury. Withdrawal of that issue from jury consideration deprived petitioner of her Sixth Amendment right to a jury trial.

II. The Eighth Circuit Erroneously Failed to Preserve Petitioner's Right to a Jury Trial, Which Right Is Constitutionally Guaranteed to Every American Accused of a Felony Crime.

Petitioner argued in her appeal to the Eighth Circuit that her conviction should be set aside and that she should be granted a new trial because the District Court had erroneously refused to permit the issue of the materiality of her allegedly false statements to be submitted to the jury for resolution. Petitioner complained that the District Court had instead ruled that "materiality" was an issue to be decided, as a matter of law, by the court itself. Petitioner argued that materiality, being one of the essential elements in a perjury claim, was an issue on which she was entitled to resolution by a jury and that the District Court's refusal to so rule deprived her of the right to a jury trial guaranteed to her by the Sixth Amendment to the United States Constitution.

Petitioner also asked the Eighth Circuit to reexamine this Court's dictum in *Sinclair v. United States*, 279 U.S. 263, 298-299, 49 S.Ct. 268, 73 L.Ed. 692 (1929), to the effect that it would be "incongruous" to leave the determination of a matter such as "materiality" in a perjury case "to a jury". Petitioner pointed out that at least two state Supreme Courts—New York and Massachusetts—had examined the *Sinclair dictum*, compared that *dictum* with other more recent opinions of this Court, and had concluded that this Court would not decide *Sinclair* the same way today.

The Eighth Circuit Court of Appeals declined petitioner's invitation, stating in footnote 4, Appendix, *infra*, at page A4, that:

> "The defendant asks us to reconsider *Sinclair v. United States* 'in light of developing trends in Constitu-

> tional law.' Brief for Appellant at 12. Even if we were to agree with the defendant's argument, we could not reevaluate a decision of the Supreme Court of the United States."

The Eighth Circuit therefore felt compelled to hold that "It is for the court and not the jury to decide the issue of materiality."

That holding is in direct conflict with *People v. Clemente,* 136 N.Y.S.2d 202, 62 A.L.R.2d 1009 (1954), unanimously aff'd, 131 N.E.2d 294, 309 N.Y. 890 (1955), and *Commonwealth v. McDuffee,* 398 N.E.2d 463, 467-69, 379 Mass. 353 (1979). Supreme Court Revised Rule 17.1(a) provides that certiorari should be favorably considered "when a federal court of appeals has . . . decided a federal question in a way in conflict with a state court of last resort."

In its well-reasoned and logically impeccable opinion in *People v. Clemente, supra,* the Appellate Division of the New York Supreme Court held that "materiality" is a concept which requires a two-fold approach. The court pointed out that the issue of *evidentiary* materiality (that is, the issue of whether evidence may properly be considered by a jury) is a threshold question that is properly resolved by the trial court. However, the court held that the issue of *substantive* materiality is a far different matter. The court expressly stated that materiality, as a substantive element of the crime of perjury, is clearly something much different than "materiality" considered in an evidentiary ruling by a trial court.

As interpreted by the New York Supreme Court, *substantive* materiality in a perjury case involves a factual determination or decision; and such a decision is historically and logically an issue for ultimate determination by the

jury. As is expressly stated in *People v. Clemente, supra,* at 62 A.L.R.2d 1015-1016:

> "While as lawyers we are accustomed to thinking of materiality as a matter for judicial ruling, there is nothing in the nature or quality of materiality which makes it essentially a legal concept or removes it from the ken of a layman's discernment and determination. The word 'material' and the idea of materiality are commonly understood, and everyday judgments on a variety of subjects are made, upon the basis of a layman's sense of materiality.
>
> "In the last analysis, questions of materiality cannot be removed from a jury's consideration. Although to an exclusionary extent, the court may rule out evidence as immaterial, it does not follow that the materiality of the evidence submitted is not something for the jury to consider in weighing the evidence. When we say that the materiality of evidence is for the court but the weight to be given to it is for the jury, we only indicate a certain separation in the function of the court and jury in sifting the evidence. It would be a mistake to think that any question of materiality is thereby removed from the jury's sphere or that the jury process of weighing evidence is something entirely apart from judging its materiality.
>
> "What the law really does, in the interest of a fair trial and a reasonably controlled trial, is to vest in the court a preliminary power of ruling on the materiality of evidence to the end that evidence which a jury should not consider at all may be excluded from their consideration altogether. A ruling in favor of materiality means no more than that the jury may consider the evidence. Its materiality then becomes a question of fact for the jury. And certainly material-

> ity as a substantive element of the crime of perjury is something more than materiality considered in an evidentiary ruling by the court. Materiality in such a case becomes a matter for ultimate determination by the decisional process."

In the instant case, the materiality of petitioner's alleged false testimony is clearly a substantive element. Petitioner respectfully suggests that since a constitutional-level prohibition prevents a judge from taking the consideration of an essential element of a crime away from the jury, no matter how clear the facts may be in evidence relative to that element, and since a guilty verdict is not to be directed by a trial court, then the failure of the District Court in the instant case to permit the jury to decide the substantive materiality issue was error.

Certainly the complexity of a legal concept does not justify removing that concept, especially when it is an essential element of a crime, from the jury's determination. For example, in a murder case one would not remove the element of "malice aforethought" from the jury simply because that concept requires complex thought-processes for resolution or because a judge might be better suited to apply that complex and elusive concept to the facts of the case.

A central principle in American jurisprudence is that a jury should be allowed to decide all underlying factual questions and, after making such factual determinations, should be permitted to apply the law to the facts so found. This principle is constitutionally mandated by the Sixth Amendment of the United States Constitution in all criminal proceeding. Petitioner therefore respectfully submits that the District Court's refusal to submit the issue of a substantive materiality to the jury for its determination in this case, and the Eighth Circuit's endorsement of that

refusal, constituted *reversible error* which can only be corrected by this Court.

In *Commonwealth v. McDuffee, supra,* the Massachusetts Supreme Court carefully and fully examined the apparent basis of this Court's dictum in *Sinclair, supra,* that materiality is always an issue to be decided by the trial court instead of by the jury. The Massachusetts Supreme Court concluded, in conformity with *People v. Clemente, supra,* that this Honorable Court would not decide *Sinclair* in the same way today. The Massachusetts Supreme Court reasoned that since this Honorable Court had long ago abandoned the out-dated precepts set forth in *Interstate Commerce Commission v. Brimson,* 154 U.S. 447 (1889), and *Horning v. District of Columbia,* 254 U.S. 135 (1920), which cases were cited by this Court in support of the *dictum* that all questions of materiality are for the trial court, then that *dictum* was similarly subject to abandonment. The Massachusetts Supreme Court went on to examine applicable modern-day constitutional standards established by this Honorable Court; and the Massachussetts Supreme Court then concluded, again in conformity with *People v. Clemente, supra,* that the Fifth Amendment's due process clause and the Sixth Amendment's enunciated right to a jury trial required submission to the jury of the *substantive* materiality issue in a perjury case.

This Court is thus faced with a clear conflict between the decision of the Eighth Circuit in this case and the decisions of the "state courts of last resort" in *Commonwealth v. McDuffee, supra,* and *People v. Clemente, supra.* The Eighth Circuit's opinion in this case is also directly in conflict with the Ninth Circuit's statement in *United States v. Valdez,* 594 F.2d 725, 729 (9th Cir. 1979), that "materiality . . . must be determined by the jury". The criteria set forth in Supreme Court Revised Rules

17.1(a) and (c) are thus met and certiorari should be granted so that this Court can resolve the conflict presented and can again bring about harmony and clarity in the law.

Respectfully submitted,

BYRON NEAL FOX, P.C.
By BYRON NEAL FOX
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Attorney for Petitioner

APPENDIX

United States of America vs.

United States District Court for

THE WESTERN DISTRICT OF MISSOURI

DEFENDANT: RITA ARMILIO

DOCKET NO. 82-00111-01-CR-W-3

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date: October 30 1982

___ WITHOUT COUNSEL However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

X WITH COUNSEL Robert Baird
(Name of counsel)

PLEA

___ GUILTY, and the court being satisfied that there is a factual basis for the plea. ___ NOLO CONTENDERE. ___ NOT GUILTY

FILED
OCT 30 1982

FINDING & JUDGMENT

There being a finding verdict of ___ NOT GUILTY. Defendant is discharged
X GUILTY.

Defendant has been convicted as charged of the offense(s) of willfully and knowingly making a false material declaration while under oath, in violation of 18 U.S.C. §1623.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and pay a fine to the United States in the sum of $500.00, and, on condition that defendant be confined in a jail-type or treatment institution for a period of six (6) months, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation for a period of two (2) years to commence upon the defendant's release from confinement, pursuant to 18 U.S.C. §3651. The conditions of probation are the general conditions adopted by this court.

SPECIAL CONDITIONS OF PROBATION

EXECUTION OF SENTENCE IS SUSPENDED until 12:00 noon, Friday, November 12, 1982, at which time the defendant shall voluntarily surrender herself at the designated place of commitment.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, at any time during the probation period, or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

X U.S. District Judge

___ U.S. Magistrate

Elmo B. Hunter

ELMO B. HUNTER

October 30, 1982

#30

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 82-2366

United States of America,
Appellee,

v.

Rita Armilio,
Appellant.

On Appeal from the United States District Court
for the Western District of Missouri.

Submitted: February 18, 1983
Filed: May 9, 1983

Before HEANEY, McMILLIAN, and ARNOLD, Circuit Judges.

ARNOLD, Circuit Judge.

Rita Armilio was found guilty of committing perjury before a grand jury in violation of 18 U.S.C. §1623 (1976).[1] She was fined $500.00 and sentenced to six months' imprisonment, to be followed by two years' probation. On appeal she contends that the trial court[2] erred because (1) it did not allow the jury to decide whether the false

1. 18 U.S.C. §1623(a) (1976) provides: "Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both."

2. The Hon. Elmo B. Hunter, Senior United States District Judge for the Western District of Missouri.

statements were material; (2) it did not expressly state what standard of proof it used to determine whether the false statements were material; and (3) the government failed to introduce sufficient evidence for the court to find that the false statements were material. We affirm.

On April 4, 1980, Missouri police officers Harold Nichols and Randy Collins spotted Ms. Armilio and Carl Civella, a convicted felon, in a vehicle driven by Mr. Civella. The police followed the car to a specialty store, where from a close distance Officer Collins saw Ms. Armilio, in the company of Mr. Civella, purchase a .38 caliber handgun. The police then followed them to the defendant's apartment.

In August 1981 a grand jury was investigating whether Carl Civella violated 18 U.S.C. §922(h) (1976) and 18 U.S.C. App. §1202(a) (1976), which prohibit possession of a firearm by a felon.[3] Ms. Armilio testified that a

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3. 18 U.S.C. §922(h) (1976) provides:

It shall be unlawful for any person—

> (1) who is under indictment for, or who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
>
> • • •
>
> to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. App. §102(a) (1976) provides:

(a) Any person who—

> (1) has been convicted by a court of the United States or of a State of any political subdivision thereof of a felony,
>
> • • •
>
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

certain Paul Varsalona, not Carl Civella, was with her when she bought the gun. The government then charged Ms. Armilio with committing perjury before the grand jury.

At trial Officers Nichols and Collins testified that Mr. Civella was with Ms. Armilio on April 4, 1980, when the gun was bought. The parties stipulated that the grand jury was investigating whether Carl Civella had possessed a firearm, and the government introduced a transcript of Ms. Armilio's entire testimony before the grand jury. The trial court instructed the jury that materiality was a question of law for the court to decide, and that if the jury found that Ms. Armilio testified falsely "such testimony was material and relevant to the investigation then being conducted by the Grand Jury." (Tr. 190). The jury returned a verdict of guilty.

18 U.S.C. §1623 makes it a crime to give false *material* testimony before a grand jury. *E.g., United States v. Beitling,* 545 F.2d 1106, 1109 (8th Cir. 1976), *cert. denied,* 430 U.S. 918 (1977). It is for the court and not the jury to decide the issue of materiality, and the courts have long so held. *E.g., Sinclair v. United States,* 279 U.S. 263, 298 (1929); *United States v. Ostertag,* 671 F.2d 262, 265 (8th Cir. 1982). Ms. Armilio's contention to the contrary is without merit.[4]

The defendant next argues that the trial court erred by not expressly stating what standard of proof it applied to determine materiality—"beyond a reasonable doubt" or "preponderance of the evidence." This failure, it is al-

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4. The defendant asks us to reconsider *Sinclair v. United States* "in light of developing trends in Constitutional law." Brief for Appellant at 12. Even if we were to agree with the Defendant's argument, we could not reevaluate a decision of the Supreme Court of the United States.

leged, prevents us from properly reviewing the court's decision.

The standards of proof for making findings of fact are, however, simply irrelevant to the determination of materiality. False testimony is material if it tends to impede or hamper the grand-jury investigation. *E.g., LaRocca v. United States,* 337 F.2d 39, 43 (8th Cir. 1964). Whether it does so is a legal question for the court to decide and not a question of fact. *E.g., United States v. Ostertag, supra,* 671 F.2d at 265.

> A question of law is by definition susceptible of only two answers: "yes," the requirements of legal principle are met or "no," they are not met. There is, in theory at least, no continuum of assurance and dubiosity as to the establishment of a proposition of law similar to the varying degrees of certainty and uncertainty which may be ascribed to propositions of fact.

United States v. Watson, 623 F.2d 1198, 1202 (7th Cir. 1980).

Although materiality is a question of law, its proper determination "depends upon the factual situation in which the testimony was given." *United States v. Koonce,* 485 F.2d 374, 380-81 (8th Cir. 1973). The government must, therefore, introduce evidence of what the grand jury was investigating, and of what testimony the defendant gave. Materiality is a legal term describing a relationship between these two sets of facts. By submitting, for example, a transcript of the grand-jury proceedings, the government enables the trial court to assess a multiplicity of facts and decide as a *matter of law* whether the perjured statements were material to the grand jury proceedings. See *United States v. Byrnes,* 644 F.2d 107, 111 (2d Cir. 1981);

United States v. Giacalone, 587 F.2d 5, 7 (6th Cir. 1978), *cert. denied*, 442 U.S. 940 (1979).[5]

The defendant next argues that the government failed to furnish enough evidence for the trial court to determine the scope of the grand jury investigation and the materiality of Ms. Armilio's false testimony. This argument is also without merit.

The trial court had before it Exhibit 1, a stipulation which stated the scope of the grand jury investigation.

> On or about August 26, 1981, there was pending before a Special Grand Jury of the United States in the Western District of Missouri, a proceeding; that is, an investigation of possible violations of Title 18, United States Code, Sections 922(h) and 1202(a) of the Appendix, involving possession of a firearm by a felon, Carl Civella. The defendant, Rita Armilio, appeared before this Special Grand Jury on August 26, 1981, and while under oath, testified in response to questions as set forth in the indictment.

When she appeared before the grand jury, the government advised Ms. Armilio of what was being investigated (Gov.

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5. In *United States v. Koonce*, *supra*, 485 F.2d at 381, this Court noted that the evidence of materiality fell "short of the 'clear, convincing and direct evidence' required by Brown v. United States, 245 F.2d 549, 556 (8th Cir. 1957) to sustain a conviction, as the testimony does not bear upon the question of whether the statements had the tendency to influence, mislead, or hamper the grand jury's investigation . . . ." This "clear, convincing and direct evidence" language does not articulate a standard for weighing the evidence, but requires that the government present particular kinds of evidence for the court to review. The government must, for example, introduce evidence of the scope of the grand-jury investigation. It would, moreover, be improper for the government to base its argument on isolated or insignificant misrepresentations made during the course of extensive questioning. The defendant's entire grand-jury testimony might have to be examined to determine materiality. *Brown v. United States*, *supra*, 245 F.2d at 555-56.

Ex. 2, p. 3). At the perjury trial, the government introduced a record of Ms. Armilio's entire grand-jury testimony. She testified that when she went to buy the weapon she was accompanied by Mr. Varsalona (*id.* p. 13), and not by Mr. Civella.

> Q. Miss Armilio, quite frankly, was Mr. Civella with you that day when you got that weapon?
>
> A. No, he wasn't. No, he was not. I would not ask Mr. Civella to go with me to get a weapon. Number one, I know he's not supposed to be anywhere near guns or anything like that. And I think he has got better sense. He wouldn't have gone if I asked him. No, he was not with me.

(*Id.* pp. 23-24).

Ms. Armilio was called to testify before a grand jury that was investigating whether Carl Civella had possessed a firearm. She denied that Mr. Civella accompanied her to buy a gun. The jury that tried the perjury case found that she had not told the truth to the grand jury. Her perjured testimony certainly tended to impede or hamper the grand-jury investigation of whether Mr. Civella unlawfully possessed a firearm. We have examined the transcript of defendant's testimony before the grand jury, and we are satisfied that there was sufficient evidence for the District Court to decide that Ms. Armilio's false testimony was material.[6]

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6. Ms. Armilio contends that it was not enough for the prosecution to furnish her testimony; she says that a record of the entire testimony before the grand jury should have been submitted. We have explicitly held, however, that "[t]he government may prove materiality in various ways: for example, it may introduce a transcript of the grand jury proceedings . . .; it may produce testimony from the foreperson of the grand jury . . .; or it may produce testimony of the defendant before the grand jury . . . ." *United States v. Ostertag, supra,* 671 F.2d at 265 (citations omitted).

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.